Filed 4/18/19 P. v. Enriquez CA5
Opinion following recall of remittitur

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIFTH APPELLATE DISTRICT

THE PEOPLE, Plaintiff and Respondent, v. EMILIANO ISIDRO ENRIQUEZ, Defendant and Appellant.	F073236 (Tulare Super. Ct. No. VCF298155) **OPINION**

APPEAL from a judgment of the Superior Court of Tulare County. Joseph A. Kalashian, Judge.

A. M. Weisman and Solomon Wollack, under appointment by the Court of Appeal, for Defendant and Appellant.

Kamala D. Harris, Attorney General, Gerald A. Engler, Chief Assistant Attorney General, Michael P. Farrell, Assistant Attorney General, Darren K. Indermill, Peter W. Thompson, and Paul E. O'Connor, Deputy Attorneys General, for Plaintiff and Respondent.

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Several alleged Norteños were driving around in a black Dodge Caliber. One of them later told a prosecutor the group was looking for the "opposition" – meaning Sureños. The Caliber pulled up behind a parked vehicle whose occupant was Hispanic with a shaved head and wearing a blue shirt. One of the Caliber's occupants exited, approached the other vehicle, and shot its occupant to death. It turned out the victim, Pedro Nunez, was a Walmart employee on his lunch break, and apparently not a Sureño.

Defendant was convicted of the murder, along with other crimes and allegations, and now raises several issues, many of which concern gang evidence. We reject the bulk of his contentions, remand for resentencing pursuant to Senate Bill No. 620 (Stats. 2017, ch. 682), and otherwise affirm the judgment.

BACKGROUND

Charges

In an information filed February 19, 2015, defendant Emiliano Isidro Enriquez was charged with the murder of Pedro Nunez (count 1; Pen. Code, § 187, subd. (a)),[1] and possession of a firearm as a felon (count 2; § 12021, subd. (a)(1).)

Additional Allegations as to Count 1

The information alleged as a special circumstance that the murder occurred while defendant was an active participant in a criminal street gang, the murder was carried out to further the activities of the criminal street gang (§ 190.2, subd. (a)(22)), and that murder is subject to a sentence of life in prison, triggering section 186.22, subdivision (b)(5). The information alleged enhancements for personally and intentionally discharging a firearm causing death or great bodily injury (§ 12022.53, subds. (d) & (e)(1)); personally and intentionally discharging a firearm (§ 12022.53, subds. (c) & (e)(1)); committing a serious or violent felony crime while on felony probation (§ 1203, subd. (k)); and having been convicted of at least two prior felonies (§ 1203, subd. (e)(4).)

[1] All further statutory references are to the Penal Code unless otherwise stated.

Additional Allegations as to Count 2

The information alleged that count 2 was committed: for the benefit of, at the direction of, or in association with a criminal street gang (§ 186.22, subd. (b)(1)); while defendant was on felony probation (§ 1203, subd. (k)); after defendant had been convicted of at least two prior felonies (§ 1203, subd. (e)(4)).

Verdicts

In December 2015, a jury convicted defendant on count 1, and found true the gang special circumstance (§ 190.2, subd. (a)(22)), gang enhancement (§ 186.22, subd. (b)(1)), and both firearm enhancements (§ 12022.53, subds. (d) & (e).) The jury also convicted defendant on count 2, and found true the gang enhancement (§ 186.22, subd. (b)(1)).

Sentence

On count 2, the court sentenced defendant to an aggravated term of three years, plus four years for the gang enhancement. On count 1, the court sentenced defendant to a consecutive term of life without the possibility of parole (§ 190.2, subd. (a)(22)), plus a consecutive 25-year-to-life term for the firearm enhancement (§ 12022.53, subd. (d)).

FACTS

Curtis B.'s Testimony

During the lunch hour on November 17, 2008, Curtis B. was driving west on Mill Creek Avenue towards Lovers Lane. Curtis was driving with his window down when he heard "a couple loud pops" along the sidewalk at a park. There were two vehicles in the area, both facing east on Mill Creek. A person in a black hoodie was standing next to the open driver's side window of the vehicles. The person then ran to the other vehicle – a small SUV – and entered it on the driver's side. The small SUV then sped away headed east on Mill Creek. Curtis checked the remaining vehicle, saw a person inside, and called 911.

Curtis told law enforcement that the individual he saw was Hispanic, with a medium skin tone, thin build, and was approximately 5 feet 7 inches or 5 feet 8 inches

tall. He also provided a partial plate: "5XA." He did not recall seeing the color red or hearing anything like "Norte."

Kirk M.'s Testimony

When the incident occurred, Kirk M.[2] was 14 years old. Kirk was working on his homework at Mill Creek Park with his sister, Ashley. Kirk heard "a couple loud noises" and saw a male in a dark, hooded sweatshirt get into the driver's seat[3] of a vehicle and drive away. The male was not wearing red. Kirk checked inside another vehicle nearby and observed its occupant was dead. Other testimony established the victim was Pedro Nunez, a Walmart employee who had been on his lunch break.

Ashley M.'s Testimony

Ashley said she heard "a few loud noises," prompting her to turn around. She saw a male in a black hoodie get into the driver's side of a vehicle, which then sped off. Ashley had seen the vehicle parked at Mill Creek Park before. The vehicle had "custom nonstock wheels."

Ashley did not see any red or blue clothing on the man wearing the hoodie, nor did she hear any "dialogue."

Michelle M.'s Testimony

Michelle M. was returning to work from lunch around 12:25 p.m. when she turned onto Mill Creek. She saw a "young man" in a gray sweatshirt standing outside of a white car, which was next to, and behind, a black car. The young man "looked kind of scared and guilty, like something had just happened." The man was "Hispanic, light-skinned, young, early 20s, slight build." He had dark hair, was clean-shaven and was no taller

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[2] We will refer to Kirk and Ashley M. by their first names, as they share a last name.

[3] On cross-examination, Kirk admitted he merely *believed* the person got into the driver's seat, and the person could have entered the *rear* seat.

than 5 feet 9 inches tall. Michelle saw the man then enter the passenger side of a Dodge vehicle.[4]

Michelle did not see the young man wearing any red clothing, nor did she hear him say anything.

Officer Howerton's Testimony

Police Officer Howerton testified that he took Michelle M.'s statement on the day of the murder. Michelle told Howerton that the man she saw was a "[l]ight complected [*sic*] Hispanic male wearing a gray baggy long-sleeved shirt, plaid shorts, with white socks up to his knees, with white shoes, approximately 5'6" to 5'8" inches tall." Michelle was sure that the vehicle she saw was a Dodge Caliber.

Richard G.'s Testimony

Richard G. was on Mill Creek Drive, waiting to make a left turn onto Lovers Lane, when he noticed two vehicles. A white vehicle with a driver inside was parked next to a curb. A black Dodge Caliber was parked "just adjacent to him and just behind him." The front driver's door on the Dodge Caliber was open and a man was approaching the white vehicle.

Richard heard two gunshots. He saw a person standing with his hand inside of the white car. As the person withdrew his hand, Richard saw a black, small-caliber[5] gun. The person entered the driver's door of the Dodge Caliber and "took off" eastbound on Mill Creek. The person was wearing a black hooded sweater and shorts.

Richard went to check on the person in the white vehicle and saw that he appeared to be deceased. Richard called 911 and drove off to find the Dodge Caliber. He

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[4] Michelle M. had initially thought the vehicle was a Volkswagen but later became convinced it was a Dodge.

[5] Richard G. owns firearms and works as a volunteer emergency responder for the Tulare County Fire Department. The firearm looked to Richard like it might have been a nine-millimeter semiautomatic gun.

eventually found what he believed to be the suspect vehicle in a cul-de-sac. A man exited the vehicle from the rear driver's side door and went to a "small dirt area." The vehicle made a U-turn and the man got back into the vehicle. The vehicle left, and Richard eventually lost sight of it.

Richard believed he told officers that day that the shooter had a ponytail, was light-skinned, around 160 pounds, and was 5 feet 8 inches or 5 feet 9 inches tall. He later told officers that the shooter had a braid going down the back of his head to his shoulders and his hair was shaved down the sides. At the time of the incident, however, Richard told officers the shooter's hair was "black, short, and stubby." Richard did not recall telling law enforcement that the person wore any red clothing, made any hand gestures suggesting gang membership, or said any gang epithets.

Autopsy

The autopsy revealed that the victim, Pedro Nunez, was shot once through the left side of his neck and once through his chest. The first wound was nonfatal, the second was fatal.

Crime Scene Evidence

James Potts, an identification technician with the Visalia Police Department, was assigned to assist in the crime scene investigation. Potts identified two spent shell casings stamped "R-P 9mm Luger" on the roadway near the driver's door. Projectiles were recovered from the victim's body: one from the chin and another from the back.

A black hooded sweatshirt, size 2 XL, was found in a cul-de-sac "maybe a half mile" from where Nunez had been shot and killed. Particles characteristic of gunshot residue were later found on the sweatshirt. The sweatshirt was sent for DNA testing to the Department of Justice laboratory in Fresno.

There were no suspects in the case until two years later, when the Department of Justice notified police of a DNA hit on the sweatshirt. Stains on the sweatshirt contained

DNA from at least three individuals, including a man named Paulino Franco. Defendant's DNA was not found on the sweatshirt.

Paulino Franco's Testimony

Around summer of 2006, Franco began to spend time with defendant. Both men associated with northern gangs.

On November 17, 2008, Franco was drinking at Sergio Saucedo's house. Defendant came over, driving his girlfriend's car. Defendant drove Saucedo and Franco to Woodlake. They stopped at a house, and defendant came back "angry." Defendant asked to borrow Franco's sweatshirt, and Franco obliged. Defendant then went into a store and bought alcohol. At some point, Saucedo's brother Juan Chavez also entered the vehicle. The group drove to Golden West, then towards Lovers Lane. While he was driving, defendant said, " 'Did you see that?' " and made an aggressive U-turn. Defendant pulled behind a vehicle and got out. He walked up to the vehicle in front of them, paused, and then shot its occupant. Defendant ran back to the car, and Franco saw a black gun in his hand. Someone – presumably defendant – threw Franco's sweatshirt to him and told him to throw it out. Franco got out of the car and threw away the sweatshirt. Defendant then came back, picked up Franco, and drove to Sergio's house.

Franco did not remember what defendant was wearing at the time. Franco did not tell officers that he heard anyone say "Norte" or anything like that.

One of the directives of the Norteño street gang was to attack, on sight, people perceived as Southern gang members. A northern gang member who sees a 20 to 25-year-old, Hispanic male with a shaved head wearing dark blue would think that person is a Southern gang member.

Sergio Saucedo's Testimony

Saucedo first met defendant when he was 12 or 13 years old. They developed a close friendship, and would drink, smoke "weed," and go on "joy rides" together.

In November 2008, Franco was staying with Saucedo. Saucedo saw Franco with a nine-millimeter P226 firearm.

Saucedo testified that the group had not discussed looking for Sureños that day. But Saucedo admitted to previously telling the prosecutor that their intention that day was to go get "the opposition." The "opposition" referred to Sureños.

Saucedo testified he was "very intoxicated" on the day of the incident. At some point that day, Saucedo, defendant and Franco were in a vehicle together. Saucedo could not remember who else was in the vehicle, but he "believe[d]" Chavez was present as well.[6]

Defendant was driving, Franco was sitting on the passenger side. They pulled up behind a vehicle and Franco exited the front passenger seat. Franco pulled a nine-millimeter handgun out of the black sweater he was wearing and shot the other vehicle's occupant twice. Franco then returned to the vehicle they came in and entered the front passenger seat. Later, Franco got out of the vehicle and "got rid" of the sweater he had been wearing.

None of them were saying "Norte" or anything like that.

Saucedo admitted that in prior statements to law enforcement, he had identified defendant as the shooter.

Defendant's Testimony

Defendant drove Jessica's car to Sergio's house. Sergio and defendant drank beer together. At one point, they became "bored" and "decided to take a cruise." They had no particular destination in mind.

Defendant was driving, and Franco was in the rear driver's side seat. Franco was wearing a black sweater and shorts. Chavez and Sergio were also in the car. The group

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[6] When the prosecutor said, "I think you testified that your brother Juan Chavez was that [*sic*] Norteno gang member." Saucedo responded, "Yeah, you could say that, yeah."

decided to hang out at the park because they had nothing to do. Defendant pulled over behind a car and did not know anyone was inside it. They sat there for 15 or 20 minutes, when "one of [defendant's] friends[7] jump[ed] out of the car, goes up to this other car, talking to somebody in the front." At some point, Franco shot the occupant of the other car, holding the gun in his left hand. Defendant thought he heard three shots. Franco ran back to the car, got into the rear driver's side seat, and screamed at defendant to drive away. Defendant screamed, " 'What did you do?' " and drove away. After driving a little ways, defendant "got up the nerve to kick [Franco] out" of the car and told him, "[G]et the f[**]k out of my car." Franco exited and disappeared out of sight. Eventually, Franco got back into the car wearing a long, gray shirt. He no longer had the black sweatshirt.

Defendant claimed he never spoke with Franco or Sergio about hunting Sureños; did not know what color shirt the victim had on, or what type of hairdo the victim had. Defendant also testified he was not a Northern gang member before he went to prison, but he did become one in prison.

Search of Defendant's Residence

Detective Ford searched defendant's residence on April 9, 2014. Ford observed numerous hats "consistent with gang indicia," along with a neatly folded red bandana and other red clothing.[8] Ford also observed that while defendant's driver's license listed him at 180 pounds, he was actually "well over" 200 pounds and was "very stout, very physically fit, and very muscular."

When defendant was booked into jail that day, several pictures of his body were taken. Those pictures depicted several tattoos, including one that read: "187 murder."

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[7] Context strongly suggests that defendant was referring to Franco.

[8] In a later review of photos, Ford also noted some blue shirts in defendant's closet.

Defendant testified that he received the tattoo after Nunez was killed, but claimed that it was unrelated.

Prosecution's Gang Expert

Officer Logan testified as the prosecution's gang expert. At the time of trial, Logan had been a sworn peace officer for 10 years and had been with Visalia's gang suppression unit for four and a half years. Logan specializes in the Norteño and Sureño gangs.

Officer Logan explained the Norteño gang originated from another group called Nuestra Familia, which began in the late 1960's. Norteños associate with the color red and the number 14. Around Visalia, the Norteños's enemies are the Sureños, who display the color blue and associate with the number 13.

Officer Logan found that defendant had several significant tattoos, including a "huelga bird," "VWL" on his back, and "187 murder." Nuestra Familia adopted the huelga bird as a symbol from the farm workers movement.

Officer Logan opined that Franco, Saucedo and defendant were Norteño gang members at the time of the murder. Logan's opinion as to defendant was based on prior contacts (including the clothing he was wearing and who he was with), tattoos, and the circumstances of the present crime.

Officer Logan reviewed "a listing" of Franco's prior contacts with law enforcement, including the following. On December 21, 2004, Franco was in a car with other gang members, and "they" shot at the windows of another car with a BB gun. On July 8, 2008, a law enforcement officer contacted Franco with defendant, who was wearing a red shirt. Logan also considered "a May 20th, 2007, case involving a possession of a firearm and some ammo and a hat with 'Visalia' on it." In a field interview with an Officer Brumley, Franco said he was a Norteño gang member and had earned his way into the gang by fighting. Logan testified he had considered a "March 15, 2008, case where Paulino Franco was driving too fast, got yelled at by somebody,

stopped his car that he was driving with a red bandana over his face, and simulated a handgun and asked, " 'Who wants some?' " Finally, Logan considered "an August 3, 2009, case, where [Franco] was arrested during a car stop and searched and live ammo for a .38 was found, as well as Northern gang clothing and other evidence" including an empty nine-millimeter magazine.

With respect to Saucedo, Officer Logan considered an October 29, 2004, case involving a fight between Norteños and Sureños. On October 27, 2005, Saucedo was arrested for his involvement in a fight at a middle school involving other Norteño gang members. On January 24, 2008, Saucedo was contacted with other North Side Visa gang members. Saucedo admitted at that time that he was an active North Side Visa Norteño. On March 21, 2008, Saucedo admitted he was on probation for a gang crime and admitted that he had been a Norteño all his life. Saucedo was also contacted with fellow gang members on May 12, 2008, and October 30, 2008. On April 26, 2009, Saucedo and two Norteño gang members committed a burglary. On November 2, 2009, Saucedo was arrested with another Norteño gang member, as they were in possession of a .22-caliber handgun. A probation report dated May 2, 2010, indicated that Saucedo had been in possession of gang writings. During field interviews on July 22, 2010, August 19, 2010, and November 4, 2010, Saucedo admitted associating with Norteño gang members. Saucedo was contacted on July 29, 2010, with Daniel Hanson who was arrested for possessing a TECH 9 assault pistol. On September 3, 2010, an Officer Speer observed Saucedo in an altercation. Saucedo said he was an active Northerner and "wasn't going to have anyone, quote 'talking s[**]t,' about them." On December 3, 2010, Saucedo was contacted in possession of a folded red bandana.

Franco and Saucedo belonged to the North Side Visa clique of Norteños. Defendant belonged to the Woodlake clique of Norteños. Officer Logan was not personally aware of an instance where members of the Varrio Woodlake Locos and North Side Visalia cliques associated together to commit a crime in 2008.

Officer Logan testified that if multiple gang members are in a vehicle, each member has an obligation to tell the other active gang members if they are carrying a gun.

Officer Logan testified the victim, Nunez, was not a southern gang member.

Defense Gang Expert

The defense gang expert opined that a hypothetical murder with similar facts to the present case would not be gang-related. The expert testified that there was no evidence "of direction from a higher-up, a note, a writing, a recording." The expert also noted that "if you're going to commit a crime or an alleged gang crime and nobody knows the gang did it, there's no fear." The expert opined that he "[did] not see gang benefit of this event."

Other Evidence

For clarity, additional gang evidence, as well as the evidence adduced at the preliminary hearing are discussed below, in connection with the issues to which they pertain.

DISCUSSION

I. The Trial Court Did Not Err in Denying Defendant's Motion Under Section 995

After the preliminary hearing, defendant moved to dismiss the gang allegations as to both counts. (§ 995.) Defendant argued the allegations were not based on reasonable or probable cause. The trial court denied the motion, and defendant now challenges that ruling.

A. Preliminary Hearing Evidence

1. Witness Richard G.

Richard G. testified at the preliminary hearing that around 2:00 p.m. on November 17, 2008, he was sitting at a stoplight facing westbound on Mill Creek near Lovers Lane. To his left, Richard observed a black Dodge Caliber behind a white car. A person exited

the driver's door of the Dodge Caliber with a black pistol, approached the driver's window of the white car, and fired two shots. The victim was wearing a blue polo shirt.

According to Richard, the shooter was about six feet tall and around 210 pounds and wore a black hooded sweater and blue pants. Officer Lampe recalled Richard's description differently: approximately 5 feet 10 inches tall and maybe 190 to 220 pounds. The shooter reentered the driver's seat of the Dodge Caliber and drove away.

Richard followed the vehicle, and eventually someone exited the rear driver's-side door. Officer Lampe testified that Richard identified a picture of Paulino Franco as possibly being the person who had exited the vehicle after the shooting but was not the shooter.

Richard said the person who had exited the vehicle after the shooting was shorter and thinner than the shooter. Officer Lampe testified that Franco is thinner (though possibly taller) than defendant.

Richard did not recall hearing any epithets or gang gestures. He gave law enforcement a partial license plate number.

2. Witness Curtis B.

Curtis B. testified that around lunchtime on November 17, 2008, he was on Mill Creek when he heard a shooting. Curtis looked to his left and saw someone in a dark hoodie running from a compact white car towards a dark, mini-SUV type of vehicle. Curtis did not remember which side of the dark vehicle the person entered. He could not say whether defendant was the person he saw that day. Curtis gave law enforcement a partial license plate number for the dark vehicle. He did not remember seeing any gang gestures or epithets or the color red.

3. Officer Lampe

Officer Lampe recounted that both Franco and Saucedo told him defendant was the shooter. Lampe also testified that the sweatshirt had gunshot residue on it, as well as Franco's DNA. The sweatshirt did not have defendant's DNA on it.

4. Officer Brown

Officer Brown testified that Ashley and Kirk M. told him the shooter got into the driver's seat of the black vehicle. Ashley did not say whether she heard any gang epithets or saw anyone wearing red.

5. Jessica

Jessica testified that on November 17, 2008, she was defendant's girlfriend. At the time, she owned a black Dodge Caliber.

6. Detective Ford

Detective Ford testified that as of April 9, 2014, defendant had several tattoos including a huelga bird on his stomach, "the Aztec symbol for 14,"[9] a clock with one hand pointing to the number 4, the letters "VWL" referring to Varrio Woodlake Locos (a Norteño clique from Woodlake), five pointed stars with red coloring and "187 murder" on his left arm. He also had a Minnesota Twins hat with the letters "TC." In local gang culture, the hat was used to represent "Tulare County." Defendant already had the "187 murder" tattoo when he was arrested in 2009.

Defendant told Detective Ford he was driving the vehicle that day, but Franco was the shooter. Ford took defendant to the scene, at which point defendant changed his story and said he was in the passenger seat and did not drive until after the shooting. At the time, defendant was "very stocky" and "very muscular."

7. Detective Pena

Detective Pena testified that in a December 2005 jail classification questionnaire,[10] defendant indicated he "associated with" Norteños. Defendant also identified his "enemies" as "scraps," which is a derogatory term for Sureños.

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[9] The number 14 is associated with Norteños.

[10] Detective Pena did not know if defendant had been warned his statements could be used against him before filling out the questionnaire.

In August 2006, in response to a jail classification question asking whether he associated with any prison gangs, defendant wrote "north." He also identified his enemies as "Scraps."

In jail classification questionnaire from September 2007, defendant wrote "northerner." In response to a question on whether he had enemies, he wrote "south."

In a 2009 questionnaire, defendant indicated he had no gang associations and no enemies. Detective Pena did not see any evidence the occupants of the Dodge Caliber were wearing red or said any gang-related epithets.

Detective Pena testified that it was his opinion Franco was a Norteño gang member by November 2007. Pena also opined that defendant was a Norteño gang member in November 2008.

Saucedo told law enforcement that the victim was Hispanic with a shaved head and a blue shirt. Saucedo said the victim "appeared to be a scrap." Detective Pena testified it is common for Sureño gang members to have shaved heads and wear blue clothing. Saucedo also said defendant was wearing a hat with a red "V" on it.

A crime like the one allegedly committed by defendant would benefit his gang because rival gangs learn of the murders and can become fearful. The exposure also creates fear in the community, discouraging witnesses from reporting crimes committed by the gang.

B. Stipulation

The parties stipulated for purposes of the preliminary hearing that Norteños are a criminal street gang under section 186.22.

C. Defendant's Challenge

Judge Brett Alldredge, acting as a magistrate, found there was sufficient cause to believe defendant committed the crimes charged, including the special allegations, and ordered defendant held to answer. Defendant later moved to dismiss the gang allegations as to both counts under section 995. Defendant argued the gang allegations were not

based on reasonable or probable cause. Superior Court Judge Joseph A. Kalashian denied the motion, and defendant now challenges that ruling.

"[S]ection 995 allows a defendant to challenge an information based on the sufficiency of the record made before the magistrate at the preliminary hearing. [Citation.] In reviewing the denial of a … section 995 motion to set aside an information, we 'in effect disregard[ ] the ruling of the superior court and directly review[] the determination of the magistrate holding the defendant to answer.' [Citations.]" (*Lexin v. Superior Court* (2010) 47 Cal.4th 1050, 1071–1072.) With respect to the evidence, "we must draw all reasonable inferences in favor of the information [citations] and decide whether there is probable cause to hold the defendants to answer, i.e., whether the evidence is such that 'a reasonable person could harbor a strong suspicion of the defendant's guilt.' [Citations.]" (*Id.* at p. 1072.)

Defendant argues the evidence at the preliminary hearing "failed to establish the existence of a single Norteno gang within the meaning of … section 186.22, subdivision (f)." For example, the prosecution's gang expert did not testify to any predicate gang crimes. But the parties stipulated for purposes of the preliminary hearing that "the Norteños are or do qualify as a criminal street gang under section 186.22." This stipulation clearly embraces the fact that a group called "the Norteños" exists and that said group is a criminal street gang under section 186.22. Because of the stipulation, the prosecution was not required to present evidence to establish the existence of the Norteño gang or its status as a criminal street gang under section 186.22.

Defendant also argues that the prosecution's expert did not establish a connection between the Varrio Woodlake Locos and any other gang. But the prosecution *did* adduce evidence that defendant was not just a Varrio Woodlake Loco but also a *Norteño*. The evidence supporting this latter inference, along with the stipulation that the Norteños are a criminal street gang, was sufficient.

D. Contrary Evidence

Defendant notes that a June 2009 classification form indicated that he did not associate with any prison gang. But that does not warrant reversal of the ruling on the motion to dismiss. While the June 2009 classification form raises the possible inference that defendant was not a gang member months earlier in November 2008, other evidence (such as the earlier jail classification questionnaires) raises the inference that defendant *was* a gang member in November 2008. As a reviewing court, "we must draw all reasonable inferences in favor of the information …." (*Lexin v. Superior Court*, *supra*, 47 Cal.4th at pp. 1071–1072.)

E. Hearsay

Defendant also complains that the prosecution's gang expert relied on hearsay statements to establish his opinion defendant was an active Norteño gang member in November 2008. But the prosecution's gang expert, as a law enforcement officer with more than five years of experience, was entitled to relate hearsay statements at the preliminary hearing. (§ 872, subd. (b); see also Cal. Const., art. I, § 30, subd. (b).)

Defendant does not explain how the evidence is insufficient to establish active participation if the hearsay evidence is included.

F. Gang-Relatedness

Defendant next contends that there is no evidence the offenses were gang-related. We disagree. Saucedo told law enforcement that the victim was Hispanic with a shaved head and a blue shirt. Saucedo said the victim appeared to be a Sureño. The gang expert testified it is common for Sureño gang members to have shaved heads and wear blue clothing. This evidence supports an inference that the occupants of the Dodge Caliber thought the victim was a Sureño.

Franco told law enforcement that defendant was driving when he said, " 'Did you see that?' " and made a quick U-turn. One reasonable inference, given defendant's gang

association and the events that followed, is that defendant saw the eventual victim and arrived at the same conclusion Saucedo did (i.e., that the victim was a Sureño).

From this evidence, the jury could have concluded that defendant was driving when he saw someone he thought to be a member of a rival gang; he made a U-turn, pulled up behind the individual, and shot him dead. Drawing all reasonable inferences in favor of the information, we conclude a reasonable person could harbor a strong suspicion that such a crime is gang related. The purported absence of even more evidence of gang-relatedness (e.g., gang epithets, gang colors, media coverage, etc.) is not dispositive.

G. Knowledge of Gang Activities

Defendant contends there was no evidence he knew about the criminal activities of the Norteño gang. We disagree. There may have been no *direct* evidence as to defendant's knowledge, but that is unsurprising because "[d]irect evidence of the mental state of the accused is rarely available except through his or her testimony." (*People v. Carr* (2010) 190 Cal.App.4th 475, 488.) That is why such knowledge is usually shown by indirect evidence. In the present context, "evidence that allows a jury to find a felony was committed for the benefit of a gang within the meaning of section 186.22, subdivision (b)(1), also typically supports a finding the defendant knew of the criminal activities of the gang." (*Ibid*.)

Here, the parties stipulated for purposes of the preliminary hearing that Norteños are a criminal street gang under section 186.22. Among other things, this stipulation necessarily embraced the fact that the Norteños are a group whose *primary activities* include one or more of the serious crimes listed in section 186.22, subdivisions (e)(1) to (25) and/or (e)(31) to (33). (§ 186.22, subd. (f).) And, defendant admitted he associated with Norteños. In sum, defendant admitted to associating with a group whose primary activities including committing crimes. Perhaps there is an abstract possibility defendant associated with a group without awareness of its primary activities. But that is not the

only reasonable inference permitted by the evidence. To the contrary, this evidence permits the inference that defendant knew the Norteños engaged in a pattern of criminal activity. Because we must indulge every inference in favor of the information, we reject defendant's challenge.

II. The Trial Court did not Err in Instructing the Jury on Aiding and Abetting

A. Background

The prosecutor told the court outside the presence of the jury that he was "going on one theory" – that defendant was the shooter (i.e., the direct perpetrator). However, the prosecutor nonetheless requested instruction on aiding and abetting because "I'm telling the jury that if you believe the defense witnesses, this is another theory that applies."

The court instructed the jury as follows:

> "To prove that the defendant is guilty of the crime based on aiding and abetting that crime, the People must prove in this case that, one, the perpetrator committed murder; two, the defendant knew that the perpetrator intended to commit murder; three, before and during the commission of the crime the defendant intended to aid and abet the perpetrator in committing murder, and; four, the defendant's words or conduct did, in fact, aid and abet the perpetrator's commission of the murder.
>
> "Someone aids and abets a crime if he knows of the perpetrator's unlawful purpose and he specifically intends to and does, in fact, aid, facilitate, promote, encourage, or instigate the perpetrator's commission of that crime. If all these requirements are proved, the defendant does not need to actually have been present when the crime was committed to be guilty as an aider and abettor.
>
> "If you conclude that the defendant was present at the scene of the crime or failed to prevent the crime, you may consider that fact in determining whether the defendant was an aider and abettor. However, the fact that a person is present at the scene of a crime or fails to prevent the crime does not by itself make him an aider and abettor.
>
> "If you conclude that the defendant was intoxicated at the time of the alleged crime, you may consider this evidence in deciding whether the

defendant, A, knew that Paulino Franco intended to commit murder, and; two, intended to aid and abet Paulino Franco in committing murder ….”

The prosecution’s closing argument presented the theory that defendant directly perpetrated the murder (i.e., he personally shot Nunez). The prosecution did mention that there was an “alternate theory” that defendant aided and abetted one of his compatriots. The prosecutor said the aiding and abetting theory was “not the People’s position” but rather was “what Saucedo described.”

During deliberations, the jury asked how aiding and abetting “relate[d] to murder 2.” One juror said, “[W]e all want more clarity regarding aiding and abetting. Under what circumstances – what constitutes aiding and abetting as relates to this case?” A juror later asked whether an aider and abettor must know the perpetrator is going to commit a murder specifically or is it enough to know the perpetrator is going to commit a crime. In follow up questioning, the court clarified that that aider and abettor must have specifically believed the perpetrator was going to commit murder.

Later, a juror asked, “Can we find him guilty on any of the charges if we do not all consecutively [*sic*] agree that he was for sure the shooter? Is there anything that we can charge him on if we do not all agree that he was the person who fired the weapon?”

B. Analysis

1. Law

Direct perpetrators, and those who aid and abet them, are both punished as“principals” to the crime. (§ 31; see also § 971; *People v. Smith* (2014) 60 Cal.4th 603, 613.) “ ‘An aider and abettor is one who acts “with knowledge of the criminal purpose of the perpetrator *and* with an intent or purpose either of committing, or of encouraging or facilitating commission of, the offense.” [Citation.]’ [Citation.]” (*People v. Smith*, *supra*, at p. 611.)

It is error to instruct the jury on a principle of law that has no application to the facts of the case at trial. (*People v. Hesslink* (1985) 167 Cal.App.3d 781, 792.)

2. Issue

Defendant contends there is not substantial evidence supporting an aiding and abetting theory of liability and, as a result, it was error to give the inapplicable instructions. We disagree.

3. Application

The evidence adduced at trial raised the following inferences, among others. Saucedo, Franco and defendant associated with the Norteño criminal street gang. Their intention that day was to go "get" Sureños. Defendant drove the group and pulled behind a vehicle whose occupant looked like a Sureño. Franco then shot the victim several times. This evidence permits an inference that defendant aided and abetted Franco in murdering the victim.[11]

Certainly, some trial evidence raised other, incompatible inferences. For one, the evidence that defendant was the shooter was arguably stronger than the evidence he merely aided and abetted Franco. But we are only reviewing whether it was appropriate to *instruct* on aiding and abetting. We merely conclude that because there was *some* substantial evidence supporting an aiding and abetting theory, the instruction was *relevant* to the facts of the case.

Moreover, we do not believe the instruction had any prejudicial effect. The jury's verdicts included a finding that defendant *personally* discharged a firearm causing great bodily injury to Nunez. While the jury's questions during deliberations shows that at least some jurors preliminarily entertained the theory defendant was an aider and abettor rather than the direct perpetrator, the subsequent, unanimous verdict that defendant

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[11] There is additional evidence in conflict with this inference, even within Saucedo's and defendant's testimony. For one, Saucedo and defendant claimed they did not know Franco would shoot anyone or that he had a gun. Saucedo also said that going to "get" the opposition did not mean murder. But the jury was free to reject these self-serving claims while accepting other parts of defendant's and Saucedo's testimony.

personally discharged a firearm causing great bodily injury to Nunez shows that the jury ultimately rejected accomplice liability. Even if the court's aiding and abetting instruction had been unwarranted, it would not have been prejudicial if the jury rejected the theory.

III. Franco's Testimony was Sufficiently Corroborated Under Section 1111

An accomplice is "one who is liable to prosecution for the identical offense charged against the defendant on trial in the cause in which the testimony of the accomplice is given." (§ 1111.)

The testimony of an accomplice must be "corroborated" by other evidence. (§ 1111.) The other evidence must do more than show a crime was committed. It must "tend to connect the defendant with the commission of the offense." (*Ibid.*)

" 'Corroborating evidence may be slight, may be entirely circumstantial, and need not be sufficient to establish every element of the charged offense. [Citations.]' [Citation.] The evidence 'is sufficient if it tends to connect the defendant with the crime in such a way as to satisfy the jury that the accomplice is telling the truth.' [Citation.]" (*People v. Lewis* (2001) 26 Cal.4th 334, 370.)

Defendant contends that Franco was an accomplice and that his testimony was not sufficiently corroborated by other evidence. We disagree. Defendant and Saucedo both testified defendant was the driver of the Dodge Caliber. And the testimony of percipient witness, Richard G., raised a strong inference that the driver of the Dodge Caliber was the shooter. Richard testified that when he saw the Dodge Caliber and victim's vehicle, the front *driver's door* on the Dodge Caliber was open and a man was approaching the white vehicle. Richard then heard two gunshots and saw a person standing with his hand inside of the white car. As the person withdrew his hand, and Richard saw he was carrying a black, small-caliber gun. The shooter then entered the *driver's door* of the Dodge Caliber and "took off" eastbound on Mill Creek.

This evidence is more than enough to corroborate Franco's testimony.

Defendant details substantial evidence suggesting Franco might have been the shooter. We agree that some evidence suggested Franco could have been the shooter. But that is not the question we face. We must determine whether *Franco*'s version of events was corroborated with evidence connecting defendant with the crime. Because it was, our inquiry ends.

IV. Defendant has Failed to Establish Error Under *People v. Prunty*

A. Background

Officer Logan testified he "look[ed] at" seven predicate offenses.

1. First Predicate Offense

Officer Logan was shown prosecution exhibit 95, a "certified conviction" of a crime that occurred on January 7, 2007. When asked if he was "familiar with the underlying facts of that particular case," Logan said he was. Logan then described the crime in pertinent part:

> "[T]hree males show up to a party, which is composed of numerous Norteno gang members and associates. The three males in [a] truck are identified by people at the party as being Sureno gang members. When they arrive, some of the partygoers refer to the Sureno as being scraps, which is a derogatory term that Northerners use to insult Surenos. At that point words are exchanged. [¶] The Nortenos start throwing beer bottles at the car, and a gunfight ensues between both the Surenos and the Nortenos. During the incident one of the Nortenos was struck in the back of the head by pretty much friendly fire and killed."

2. Second Predicate Offense

Officer Logan was then shown two exhibits and asked whether they reflected "a conviction for voluntary manslaughter" as to Richard Contreras and Javier Solis. Logan responded affirmatively. Logan was then asked if he was "familiar with that case," and Logan responded he was.

Logan testified that Norteño gang members, Javier Solis and Richard Contreras, confronted Matthew Manes, and an altercation ensued. One of the two assailants yelled "Norte" – or something to that effect – and stabbed Manes to death.

3. Third Predicate Offense

Officer Logan was shown another exhibit and was asked whether it was "a certified prior conviction for attempted murder with gang and great bodily injury" with respect to a crime in Woodlake on November 11, 2007. Logan responded affirmatively.

Officer Logan was then asked, "What can you tell us about that case?" Logan said that officers responded to a vandalism at a residence in Woodlake. They found a Sureño gang member who had been stabbed. A man named George Castenada was convicted of "attempted homicide" with a gang enhancement.

Officer Logan testified that Woodlake has a Norteño clique called Varrio Woodlake Locos.

4. Fourth Predicate Offense

Officer Logan was then asked if he was familiar with two certified convictions pertaining to Christopher Aguilar and Pete Gallegos. Logan responded he was. Logan was asked if he was "familiar with that taking place on May 16, 2008, in the jail." Logan replied, "[Y]es."

Officer Logan was then asked "what that consisted of." Logan explained Gallegos and Aguilar were in a cell at the Tulare County pretrial facility when they asked Javier Delrio if he was a Southerner or a Sureño and then attacked him.

5. Fifth Predicate Offense

Officer Logan was shown another exhibit and asked if it was "a conviction for Brandon Flores for first degree murder with a special circumstance of gang for a murder that took place on August 16, 2007." Logan responded it was.

Officer Logan was then asked to tell the jury what the facts were behind the conviction. Logan explained that Daniel Saesee was walking when several people

accosted him and asked him if he was in a gang. The people were "insinuating he is a member of the Oriental Troops, which is the Crips, and the rival of the Nortenos." One of the people shot Saesee, and then they all rode off on their bikes.

6. Sixth Predicate Offense

Officer Logan was shown two more exhibits and asked if he was familiar with "these two convictions" of first degree murder. Logan replied that he was.

Officer Logan was then asked if he was familiar with the underlying murder, which took place on May 19, 2010. Logan replied he was. Logan said that Jacob Robles and Julian Gonzales "were members of a hit squad who were tasked by, at that time, the person in charge of security for the city of Visalia, Joe Dominguez." "They were tasked with killing a Northern dropout, who goes by the moniker Cody, whose real name is Felix Estrella." They killed shot someone who turned out not to be Cody.

7. Seventh Predicate Offense

Officer Logan was shown two additional exhibits and asked if he was familiar with the convictions of Adrian Esquer and Anthony Hanson for multiple attempted murders taking place on January 27, 2012. Logan was then asked if he could "tell us what that was about." Logan said Chris Burris, a North Side Varrio Loco was at the mall with his girlfriend and child. He was approached by a group of Sureños and words were exchanged. Burris called for fellow gang members, who then drove to the mall. Esquer and Hanson approached the Sureños in a candy store. Esquer then fired a .22-caliber handgun into the candy store, striking "one of the associates" and an "innocent civilian."

B. Analysis

In *People v. Prunty* (2015) 62 Cal.4th 59 (*Prunty*), the Supreme Court held that "the gang the defendant sought to benefit … and the group whose actions the prosecution alleges satisfy the … predicate offense requirements of section 186.22(f), must be one and the same." (*Id.* at pp. 75–76.) In other words, prosecutors cannot show that

defendant intended to benefit one gang while relying the predicate offenses of another gang to satisfy the statutory requirements.

Defendant argues that only one predicate offense involved the Varrio Woodlake Locos subset to which he allegedly belonged. This fact is not dispositive. While defendant's "VWL" tattoo indicated he was a member of the Varrio Woodlake Loco clique, there was also evidence defendant simultaneously associated directly with the broader Norteño gang, and that he intended to benefit the Norteño gang by killing a perceived rival. *Prunty* does not prohibit the prosecution from proving the defendant sought to benefit a gang (i.e., the Norteños) while relying on predicate offenses by the *same* gang (i.e., Norteños).[12]

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[12] For this reason, we reject defendant's additional claim the trial court erred in failing to instruct the jury on *Prunty*'s organizational nexus requirement. The prosecution in this case did not need to rely on an organizational nexus, because it adduced evidence that (1) defendant intended to benefit Norteños and that (2) Norteños had committed sufficient predicate offenses. In other words, there was evidence defendant intended to benefit one gang (i.e., Norteños), and sufficient predicate offenses were established for *the same* gang (i.e., Norteños).

Defendant says Officer Logan "provided no evidence that members of the gangs that committed the predicate crimes behaved in a manner that conveyed their identification with the larger association that appellant allegedly sought to benefit." Even assuming defendant's characterization of the evidence was accurate, it would not be dispositive. In order to qualify as a predicate offense, the gang members involved need not "convey[] their identification" with the gang. Indeed, predicate offenses need not be gang-related at all. (*People v. Gardeley* (1996) 14 Cal.4th 605, 621–622, disapproved on other grounds in *People v. Sanchez* (2016) 63 Cal.4th 665, 686, fn. 13 (*Sanchez*).) What matters is that the predicate offenses be committed by members of the gang. (See § 186.22, subd. (f) [part of definition of criminal street gang is that its "members individually or collectively engage in, or have engaged in, a pattern of criminal gang activity."]) And that was satisfied here as to the Norteño gang because Logan identified multiple predicate offenses committed by Norteños. Whether those Norteños conveyed their identification as gang members during those crimes is irrelevant. (See *People v. Gardeley*, *supra*, 14 Cal.4th at p. 610 [predicate offenses need not be gang-related].)

Because Logan's testimony established predicate offenses for the Norteño gang, and there was sufficient evidence defendant sought to benefit the Norteño gang with his conduct, an organizational connection between subsets was not required.

Moreover, *Prunty* permits the prosecution to rely on the conduct of multiple gang subsets if it "introduce[s] evidence showing an associational or organizational connection that unites members of a putative criminal street gang." (*Prunty*, *supra*, 62 Cal.4th at p. 67.) "The prosecution has significant discretion in how it proves this associational or organizational connection to exist …." (*Ibid.*) For example, Norteño subsets do not need to interact with one another and may even be "unaware of one another's activities" if "each subset contains a 'shot caller[]' who 'answer[s] to a higher authority' in the Norteño chain of command. [Citations.]" (*Id.* at p. 77.) Alternatively, "[s]ubsets may also be linked together as a single 'criminal street gang' if their independent activities benefit the same (presumably higher ranking) individual or group. An example would be various Norteño subset gangs that share a cut of drug sale proceeds with the same members of the Nuestra Familia prison gang. More indirect evidence may also show that distinct gang subsets are organizationally linked. For instance, proof that different Norteño subsets are governed by the same 'bylaws' may suggest that they function – however informally – within a single hierarchical gang. [Citation.]" (*Ibid.*)

Here, the prosecution did produce evidence of an associational and organizational connection between the various Norteño cliques or subsets in Visalia. Officer Logan testified that *all* street-level Norteños answer to a group called Nuestra Familia. The Nuestra Familia is "structured similar to … the Italian Mafia, where you have a boss," except that the Nuestra Familia has three bosses in charge. Norteños are organized into "regiments" which are responsible for collecting money, selling narcotics, and committing murders and robberies to generate money for influential "generals" in charge of Nuestra Familia. "Pistol" Pete Sanchez from Porterville was the "commander" of the regiment in Tulare County. His "boss" was Jose Martinez (aka "Slow Joe") from Porterville, who was in charge of all Tulare County. Martinez, in turn, reported to a man named Sal Castro.

Nuestra Familia has directed the Norteño cliques in Tulare County – including the North Side Visa and Woodlake cliques – to work together. Unlike Los Angeles area gangs which claim certain city blocks as "their turf," all Norteños groups in the area "function as one" under the singular Norteño umbrella. While some Norteños will identify with a particular neighborhood, they are still "all Norteños." "They get along. They can make crimes together. They hang out together."

Similarly, Saucedo[13] himself testified that while there are "many gangs in Visalia," they are all Norteños. He said, "It's all the same thing. It don't matter if you're from Visalia, Woodlake, Sacramento. It don't matter. It's still the same thing. It doesn't matter where you're from."

Franco also testified that *all* "sets" of Norteños follow the directions of the bosses of Nuestra Familia. As a result, it is not uncommon for Norteños from Woodlake, Visalia, and Farmersville to work together. Franco also said that *all* sets of Norteños live by the same 14 "bonds" or rules.

Because the prosecution produced evidence supporting an organizational and associational nexus between all Norteño cliques in Visalia, *Prunty* was not violated.

V. There was Substantial Evidence that Norteños Satisfied the "Primary Activities" Requirements of Section 186.22

Defendant contends there was insufficient evidence to support the primary activity requirements of section 186.22. We disagree.

"Proof that a gang's members consistently and repeatedly have committed criminal activity listed in section 186.22, subdivision (e)[(1)–(25), (31)–(33)] is sufficient to establish the gang's primary activities." (*People v. Duran* (2002) 97 Cal.App.4th 1448, 1464–1465 (*Duran*).) Among the crimes listed in subdivision (e)(1) to (25), (31) to (33) are assault with a deadly weapon or by means of force likely to produce great bodily

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[13] Saucedo admitted he had associated with the Norteño gang in the past.

injury, robbery, unlawful homicide, sale of controlled substances, felony vandalism, witness intimidation, and firearm possession. (§ 186.22, subd. (e).) Here, there was testimony that Norteños "consistently and repeatedly" have committed qualifying crimes.

Officer Logan was asked about his experience with Norteños before joining the gang suppression unit. Logan said his experience with Norteños consisted of "[i]nvestigating gang crimes, such as shootings, vandalisms, firearms possession, narcotics sales."

Officer Logan testified that Nuestra Familia "created pretty much an army [(i.e., Norteños)] *in order to* provide more influential people or the generals in charge of the Nuestra Familia, along with their members, with money. *That's all done by committing crimes*." (Italics added.) Logan explained that Norteños commit violent crimes because it will scare witnesses and victims, allowing them to commit burglaries and robberies.

Officer Logan also described "regiments," which "is just an organized group of these Norteños who are responsible for collecting money, *selling narcotics, hitting, or killing people, robberies.* They function in order to make money to provide to the Nuestra Familia." (Italics added.) When Norteño gang members commit a robbery, they are expected to "kick back" money to the gang's chain of command. Logan also testified that Norteños sell narcotics "blatantly."

Officer Logan also explained that if a gang member does not provide certain paperwork to the gang, they will "be hit in what they call a removal." "It's a *physical assault* by [] upwards of many members with makeshift knives, known as shanks within the walls of the prison system. But they're gonna hit you and they're gonna do what they can do to either severely injure you or kill you."

Moreover, "[p]ast offenses, as well as the circumstances of the charged crime, have some tendency in reason to prove the group's primary activities, and thus both may be considered by the jury on the issue of the group's primary activities. [Citation.]" (*Duran*, *supra*, 97 Cal.App.4th at p. 1465.) Officer Logan described seven predicate

offenses, including several unlawful homicides. (Discussion § IV, *ante*.) And the circumstances of the present offense illustrate another murder and firearm possession committed by a Norteño.

In sum, Officer Logan's testimony supported an inference that Norteños "consistently and repeatedly have committed" (*Duran, supra*, 97 Cal.App.4th at p. 1464) assaults with a deadly weapon or by means of force likely to produce great bodily injury, robberies, unlawful homicides, selling controlled substances, felony vandalism, witness intimidation, and firearm possession. (See § 186.22, subd. (e).)

A. Substantial Evidence Supported the Gang-relatedness Requirement of the Gang Enhancement

Defendant contends there was insufficient evidence of gang-relatedness. We disagree.

"To prove the [gang] enhancement with respect to an offense, the prosecution must show that offense was 'committed for the benefit of, at the direction of, or in association with any criminal street gang, with the specific intent to promote, further, or assist in any criminal conduct by gang members ....' (§ 186.22, subd. (b)(1).) 'The enhancement … requires proof that the defendant commit a gang-related crime ….' [Citation.]" (*People v. Pettie* (2017) 16 Cal.App.5th 23, 50.)

" 'In reviewing the sufficiency of evidence under the due process clause of the Fourteenth Amendment to the United States Constitution, the question … is "whether, after viewing the evidence in the light most favorable to the prosecution, *any* rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt." ' [Citations.] The California Constitution requires the same standard. [Citation.] 'In determining whether a reasonable trier of fact could have found defendant guilty beyond a reasonable doubt, the appellate court "must view the evidence in a light most favorable to respondent and presume in support of the judgment the existence of every

fact the trier could reasonably deduce from the evidence" ' [citation]." (*People v. Pettie*, *supra*, 16 Cal.App.5th at p. 47, original italics.)

There was substantial evidence supporting all of the following facts/inferences. Defendant, Saucedo and Franco, were in a car together. At the time, each of them associated with or were members of the Norteño criminal street gang. One of the "directives" of the Norteño gang was to attack Southern gang members on sight. The group's intention in driving around that day was to "get the opposition" – meaning Sureños. As defendant was driving, he said, " '[D]id you see that?' " and made an aggressive U-turn to pull up behind a vehicle with Pedro Nunez inside. Saucedo thought Nunez was a Southern gang member because "he was wearing blue shirt" and was bald. Defendant then walked up and shot Nunez. Based on these facts and inferences, a jury could reasonably conclude the crime was gang-related.

Certainly, as defendant notes, there are other factors that do not suggest gang-relatedness (e.g., absence of gang colors or epithets)**[14]**. But on substantial evidence review, " '[i]t is of no consequence that the jury believing other evidence, or drawing different inferences, might have reached a contrary conclusion.' [Citation.]" (*People v. Ghipriel* (2016) 1 Cal.App.5th 828, 832.)

B. Defendant has Failed to Show Error Under Sanchez

Defendant claims Officer Logan's testimony violated *Sanchez*, *supra*, 63 Cal.4th 665.

With certain exceptions, *Crawford v. Washington* (2004) 541 U.S. 36 (*Crawford*), held "the admission of testimonial hearsay against a criminal defendant violates the Sixth Amendment right to confront and cross-examine witnesses." (*People v. Sanchez*, *supra*,

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[14] Defendant also points to "the testimony of [his] own gang expert …." (*People v. Pettie*, *supra*, 16 Cal.App.5th at p. 51.) "In assessing the sufficiency of evidence on appeal, however, the reviewing court does not weigh the credibility of dueling experts." (*Ibid.*)

63 Cal.4th at p. 670.) To trigger *Crawford*, the evidence in question must be both testimonial and hearsay. Even testimonial evidence is admissible under the confrontation clause if it is not hearsay. (See *Sanchez*, at p. 674 [the confrontation clause " 'does not bar the use of testimonial statements for purposes other than establishing the truth of the matter asserted.' [Citation.]".) As a result, before *Sanchez*, prosecutors would sometimes argue that statements relied upon by a gang expert were offered not for their truth, but rather as a basis for the expert's opinion. (See Evid. Code, §§ 801–802.) *Sanchez* rejected that notion, holding that "[w]hen an expert relies on hearsay to provide case-specific facts, considers the statements as true, and relates them to the jury as a reliable basis for the expert's opinion, it cannot logically be asserted that the hearsay content is not offered for its truth." (*Sanchez*, at p. 682.) However, *Sanchez* did not "call into question the propriety of an expert's testimony concerning background information regarding his knowledge and expertise and premises generally accepted in his field." (*Id.* at p. 685.)

In sum, this first prong of *Sanchez* has us ask whether the statements relied upon and conveyed by the expert involved "case-specific facts" or "background information." If the statements solely concern background information, the confrontation clause poses no barrier to admission. However, if the statements convey case-specific facts, we must move to the "second prong of the analysis …" and determine whether the statements were testimonial. (*Sanchez*, *supra*, 63 Cal.4th at p. 687.)

"Testimonial statements are those made primarily to memorialize facts relating to past criminal activity, which could be used like trial testimony. Nontestimonial statements are those whose primary purpose is to deal with an ongoing emergency or some other purpose unrelated to preserving facts for later use at trial." (*Sanchez*, *supra*, 63 Cal.4th at p. 689, fn. omitted.)

If the statements are not hearsay, they are admissible. If the statements are nontestimonial hearsay, then their admission "may constitute state law statutory error."

(*Sanchez, supra,* 63 Cal.4th at p. 698.) The confrontation clause is only implicated when the statements are both testimonial and hearsay.

The latter is the type of claim defendant presents here. He claims Officer Logan's statements were testimonial hearsay. But defendant does not explain on an individual level why each fact related by Logan was testimonial hearsay. Instead, he "incorporates by reference" the entire summary of Logan's predicate-crimes testimony and deems it all to be testimonial hearsay. As described above, the determination of whether a statement is testimonial hearsay is a fact-intensive and statement-specific endeavor. Defendant's blanket argument on appeal is not sufficiently developed. Moreover, an essential premise of defendant's argument is that Logan's testimony was based on "police reports authored by non-testifying officers." But he provides no citation to the record for that claim. Accordingly, we reject defendant's claim because it is "not supported by meaningful analysis with record citations …." (*People v. Miranda* (2016) 2 Cal.App.5th 829, 837.)

Moreover, we note that our review of Officer Logan's predicate offense testimony demonstrates that many of Logan's statements are not expressly attributed to "police reports authored by non-testifying officers." At the outset of the predicate offense testimony, the prosecutor asked Logan, "For purposes of this case, did we have you take a look at approximately seven cases, seven crimes?" to which Logan responded, "Yes." For the first predicate offense, Logan was shown an exhibit and asked if it was "a certified conviction from a crime that occurred January 7, 2007, in Cutler." Logan responded that it was. Logan was then asked, "Are you familiar with the underlying facts of that particular case?" to which Logan responded, "Yes, I am." Logan was then asked, "What do they involve?" to which Logan responded by describing the predicate offense. Logan's testimony regarding the other predicate offenses generally followed a similar pattern.

While Officer Logan did authenticate a prosecution exhibit at the outset of his testimony on each predicate offense, it is far from clear that his knowledge of each case

was derived from the exhibit, rather than personal knowledge. That is, Logan's familiarity with the underlying facts *could* have been derived solely from reviewing police reports and/or other documents for the seven cases the prosecutor told him to look at. Or, Logan's familiarity with the facts of the predicate offenses could have resulted from personal involvement in responding to, investigating or making arrests in some or all of those cases during his 10 years working as a sworn peace officer. The record simply is not clear in this regard.

One reason the record is not clear on this point is that defense counsel did not object on confrontation clause[15] grounds during Officer Logan's predicate offense testimony.[16] "Had defendant lodged contemporaneous objections during trial, the People, as the proponent of the evidence, would have had the burden to show the

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[15] Defense counsel objected on hearsay grounds to one question concerning whether the victim of the fifth predicate offense (i.e., Saesee) was a breakdancer. This is not the same as the confrontation clause issue defendant now raises on appeal. (See *People v. Chaney* (2007) 148 Cal.App.4th 772, 778–779 [distinction between hearsay and confrontation clause objections].) "A *Crawford* objection generally requires a court to consider whether statements are testimonial, and, if so, whether a witness was unavailable and the defendant had a prior opportunity for cross-examination. This invokes different legal standards than … a hearsay objection, which generally requires a court to consider whether the foundational requirements for admission of particular hearsay have been satisfied. [Citation.]" (*People v. Rangel* (2016) 62 Cal.4th 1192, 1217.) In any event, we are not holding that defendant forfeited the issue by failing to object, but rather that he has failed to carry his appellate burden. (See fn. 17, *post*.)

[16] During trial, outside the presence of the jury, defense counsel made the following motion: "[W]e're asking that the [incarceration] *intake documents not be referenced* as not supported by constitutional warnings, i.e., *Miranda* [*v. Arizona* (1966) 384 U.S. 436 (*Miranda*)]. We're asking that the gang expert not be allowed to testify purely on hearsay without some type of substantiation *on that*." The prosecutor agreed that "the current state of the law is without *Miranda* warnings that are waived, that is not something based on the case in chief that we can present. I would be directing my gang expert not to speak about that."

Defendant's motion does not constitute an objection on confrontation clause grounds to Officer Logan's predicate offense testimony.

challenged testimony did not relate testimonial hearsay. [Citations.]" (*People v. Ochoa* (2017) 7 Cal.App.5th 575, 584.) "However, as no such contemporaneous objections were lodged, we cannot simply assume" (*id.* at p. 585, fn. omitted) the statements at issue were testimonial hearsay. To the contrary, error must be *affirmatively* shown by the record. (*Ibid.*, citing *People v. Giordano* (2007) 42 Cal.4th 644, 666.) "[D]ue to defendant's failure to object, the record is not clear enough for this court to conclude which portions of the expert's testimony involved testimonial hearsay. Accordingly, defendant has not demonstrated a violation of the confrontation clause."[17] (*Ochoa*, *supra*, at p. 586.)

[17] Defendant argues that an issue is not forfeited if the pertinent law subsequently changed in an unforeseeable way. But we are not holding that defendant forfeited the confrontation clause issue by failing to object. Instead, we conclude that defendant has failed to carry his appellate burden of affirmatively demonstrating error. We are merely observing that the *reason* he cannot carry his burden is an insufficient record resulting from the absence of objection.

The trial in *Ochoa* also concluded well before the Supreme Court issued *Sanchez*. Nonetheless, *Ochoa* observed that there was an insufficient record caused by the absence of an objection. As a result, *Ochoa* concluded "defendant has not demonstrated a violation of the confrontation clause." (*Ochoa*, *supra*, 7 Cal.App.5th at p. 586.)

VI. The Matter is Remanded for Resentencing Under Senate Bill No. 620

Defendant contends, and the Attorney General concedes, he is entitled to resentencing under Senate Bill No. 620.[18] (Stats. 2017, ch. 682.) We accept the concession (see *People v. McDaniels* (2018) 22 Cal.App.5th 420, 424–428) and remand for resentencing.

DISPOSITION

The matter is remanded for the trial court to consider striking the Penal Code section 12022.53 enhancement pursuant to Senate Bill No. 620. In all other respects, judgment is affirmed.

_____
POOCHIGIAN, J.

WE CONCUR:

_____
LEVY, Acting P.J.

_____
MEEHAN, J.

[18] Defendant did not raise this issue in his opening or reply briefs, or any petition for rehearing. Eventually, defendant moved to recall the remittitur to raise this issue. We granted that motion and directed the parties to brief the issue. In that briefing, the Attorney General conceded remand was required.